IN THE SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA

FILED
JAN 16 2007
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

STATE OF WEST VIRGINIA,

Plaintiff Below/Appellee,

vs: **No. 33188**

DAVID NELSON,

Defendant Below/Appellant.

APPELLANT'S BRIEF

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THE KIND OF PROCEEDING AND NATURE OF RULING IN THE CIRCUIT COURT

NOW COMES David Nelson, who at all times hereinafter mentioned shall be referred to as "Appellant", by Counsel, Mark Hobbs, pursuant to Indictment No. J05-F-28, and submits the following Appellant's Brief concerning his Petition for Appeal of a Final Order entered in the Circuit Court of Mingo County, West Virginia, on May 20, 2005, regarding a sentencing hearing held on May 17, 2005. The sentences hereinafter described were a result of a jury verdict rendered in this matter on April 15, 2005. Your Appellant was sentenced by the Honorable Michael Thornsbury to FIRST DEGREE MURDER (West Virginia Code 61-2-1) - a definite term of life without mercy; KIDNAPPING (West Virginia Code 61-2-14(a)) - a definite term of life without mercy; FIRST DEGREE SEXUAL ASSAULT (West Virginia Code 61-8B-3(a)(1)(i)) - an indefinite term of not less than fifteen (15) years nor more than thirty-five (35) years; CONSPIRACY (MURDER) (West Virginia Code 61-10-31 and 61-2-1) - an indefinite term of not less than one (1) nor more than five (5) years; CONSPIRACY (KIDNAPPING) (West Virginia Code 61-10-31 and 61-2-14(a)) - an indefinite term of not less than one (1) nor more than five (5) years; CONSPIRACY (FIRST DEGREE SEXUAL ASSAULT) (West Virginia Code 61-10-31 and 61-8B-3(a)(1)(i) - an indefinite term of not less than one (1) nor more than five (5) years. All

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sentences were to run consecutively. The Appellant was also assessed costs, fines and restitution in the amount of $5,403.61.

STATEMENT OF FACTS

NOW COMES THE Appellant, David Nelson, and represents to this Honorable Court that the following facts are applicable in this matter:

1. According to the statement of Alfred Dingess, Jr. given on September 1, 2002, Alfred Dingess, Jr. and Aaron Nelson, on or about August 30, 2002, along with the victim, Wanda Lesher, were traveling from the Mud Fork area of Logan County in the vehicle of the victim.

2. According to the statement of Alfred Dingess, Jr. given on September 1, 2002, when the three approached the road that leads to the Canterbury Cemetery, Aaron Nelson instructed that the driver of the vehicle, Wanda Lesher, to turn onto the road that leads up to the cemetery.

3. According to the statement of Alfred Dingess, Jr. given on September 1, 2002, while at the cemetery, the two accused made the victim have sexual relations with them through force and intimidation. The victim asked several times if she could go home to spend time with her children. One of the accused took a two-by-four from a picnic table and proceeded to strike the victim multiple times with a two-by-four

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board about the face, head, back and torso causing extensive injuries to the victim.

4. It should be noted that the statement of Alfred Dingess, Jr. given on September 1, 2002, did not implicate your Appellant, David Nelson.

5. Approximately fourteen (14) months later, Alfred Dingess, Jr. changed his story and gave a statement that implicated your Appellant, David Nelson.

6. The Appellant in this case at hand was subsequently arrested on November 14, 2003, and charged with the crime of Murder and other felony charges. A probable cause hearing was held wherein your Appellant was bound over to the Grand Jury for the January 2004 term. An indictment was eventually returned but was superseded by Indictment No. J05-F-28 which alleged the six (6) counts listed above surrounding the death of Wanda Lesher.

7. A jury trial was held in this matter on April 11, April 12, April 14 and April 15, 2005. The Appellant's defense was alibi wherein he offered evidence to indicate that at the time of the death involving Wanda Lesher, Appellant was at home with his two (2) daughters. The jury returned their verdict on April 15, 2005.

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8. It is undisputed that Wanda Lesher was killed on the late night of August 30, 2002, or the early morning hours of August 31, 2002. The medical examiner indicated that the cause of death was massive brain injuries as a result of trauma to the head.

9. It is undisputed that Alfred Dingess, Jr. eventually pled guilty to murder in the first degree and received a sentence of life with the recommendation of mercy. It is undisputed that the Appellant's brothers, Aaron Nelson and Clinty Nelson, were convicted in this matter and now are serving life sentences without the possibility of parole. It is undisputed that Zandell Bryant was convicted by a jury and it is Appellant's belief that Zandell Bryant would have to serve a minimum of thirty (30) years before eligibility for parole.

ASSIGNMENTS OF ERROR

THE COURT ERRED WHEN IT FAILED TO CONDUCT A HEARING UNDER RULE 404(b) OF THE WEST VIRGINIA RULES OF EVIDENCE AND PERMITTED THE STATE TO USE EVIDENCE CONCERNING ALLEGATIONS THAT THE APPELLANT HAD SEXUALLY ABUSED HIS 13-YEAR-OLD SISTER IN 1987.

THE COURT ERRED WHEN IT VIOLATED RULE 801(d)(1)(B) OF THE WEST VIRGINIA RULES OF EVIDENCE BY PERMITTING AN OUT-OF-COURT STATEMENT OF A CO-CONSPIRATOR TO BE USED AGAINST THIS APPELLANT WHEN THE DECLARANT WAS AVAILABLE AND TESTIFIED AT THE TRIAL.

REVERSIBLE ERROR WAS COMMITTED IN THIS CASE AS THE ASSISTANT PROSECUTING ATTORNEY MADE IMPROPER REMARKS DURING OPENING STATEMENTS.

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POINTS AND AUTHORITIES

CONSTITUTIONAL AUTHORITY:

1. Amendment V to the United States Constitution.
2. Amendment VI to the United States Constitution.
3. Article III, Section 10 of the Constitution of West Virginia.
4. Article III, Section 14 of the Constitution of West Virginia.

STATUTORY LAW:

1. West Virginia Code Section 61-2-1
2. West Virginia Code Section 61-2-14(a)
3. West Virginia Code Section 61-8B-3(a)(l)(i)
4. West Virginia Code Section 61-10-31

CASE LAW:

1. State v. McGinnis, 193 W.Va. 147, 455 S.E. 2d 516 (1994).
2. Syllabus point 1, State v. Edward Charles L., 183 W.Va. 641, 398 S.E. 2d 123 (1990).
3. State v. Hanna, 180 W.Va. 598, 378 S.E. 2d 640 (1989).
4. State v. LaRock, 470 S.E.2d 613 (1996).
5. State v. Taylor, 215 W.Va. 74, 593 S.E. 2d 645 (2004).
6. State v. McDaniel, 211 W.Va. 9, 560 S.E. 2d 484 (2001).
7. State v. Quinn, 200 W.Va. 432, 490 S.E. 2d 34 (1997).
8. State v. Ocheltree, 170 W.Va. 68, 289 S.E. 2d 742 (1982).

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9. State v. Sugg. 193 W.Va. 388, 456 S.E. 2d 469 (1995).

RULES:

1. Rule 402 of the West Virginia Rules of Evidence.
2. Rule 403 of the West Virginia Rules of Evidence.
3. Rule 404(b) of the West Virginia Rules of Evidence.
4. Rule 104(a) of the West Virginia Rules of Evidence.
5. Rule 801(d)(1)(B) of the West Virginia Rules of Evidence.
6. Rule 802 of the West Virginia Rules of Evidence.
7. Rule 804(b)(3) of the West Virginia Rules of Evidence.

DISCUSSION OF LAW

THE COURT ERRED WHEN IT FAILED TO CONDUCT A HEARING UNDER RULE 404(b) OF THE WEST VIRGINIA RULES OF EVIDENCE AND PERMITTED THE STATE TO USE EVIDENCE CONCERNING ALLEGATIONS THAT THE APPELLANT HAD SEXUALLY ABUSED HIS 13-YEAR-OLD SISTER IN 1987.

As incredible as it sounds, the Trial Court failed to conduct a 404(b) hearing with regards to certain allegations apparently made by the Appellant's sister approximately in 1987. More specifically, the Prosecutor asked the following questions:

Q. Who's Sheila Nelson?
A. That's my sister.
Q. You love her don't you?
A. Yes, sir.
Q. You loved her so much that you sexually abused her from age 13, didn't you?
A. No, sir.

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Appellant's Counsel objected and a bench conference was held wherein the Judge decided to allow the evidence. (Transcript of April 15, 2005, Tr. Pages 107 & 108). It was the Court's erroneous belief that because your Appellant's defense was alibi and because evidence was submitted that Appellant was a family man and that it was his history to be at home with his family, then the State should be allowed to offer evidence to rebut the same. However, the Court failed to take into consideration that the allegations against your Appellant involving his 13-year-old sister allegedly occurred in 1987 long before the Appellant was ever a family man. The Court then proceeded to allow the Prosecutor to ask the following questions:

Q. In fact, you, Clinty Nelson, both sexually abused your younger sister?
A. No, sir.
Q. Since she was age 13?
A. No.
Q. You had sex with her a couple of times in Logan County, didn't you?
A. No, sir. I didn't.
Q. She stayed home you would come in her room and force her to have sexual intercourse with you and you did it at least four times?
A. No, sir. I didn't.
Q. You abused your other sisters, too?
A. No, sir. I didn't.
Q. They were afraid to come forward like Sheila?
A. No, sir.
Q. Did she get counseling for sexual abuse, that sexual intercourse that you made her go through? Her own brother?

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A. I don't know.
Q. You sexually assaulted your sister just like Wanda Lesher on August 31, 2002?
A. No, I didn't.
Q. You have a history of it, don't you?
A. No, I didn't.
Q. The family man has a history of –
A. No.
Q. taking advantage –
A. No.
Q. of women –
A. No, sir.
Q. in the most egregious way?
A. No. (Transcript April 15, 2005, Tr. Pages 108 - 110)

The Prosecutor again took advantage of the Court's failure to exclude this evidence under 404(b) as the Prosecutor stated in closing argument "Same family man who was accused by his sister of doing horrible things. The same things, at least partly to Wanda Lesher." (Transcript April 15, 2005, Tr. Page 218).

"When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury

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in the trial court's instruction." Syllabus Point 1, State v. McGinnis, 193 W.Va. 147, 455 S.E. 2d 516 (1994).

"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. W.Va. R.Evid. 404(b)." Syllabus point 1, State v. Edward Charles L., 183 W.Va. 641, 398 S.E. 2d 123 (1990).

The purpose of this rule is to prevent the conviction of an accused for one crime by the use of evidence that he has committed other crimes, and to preclude that the inference that because he had committed other crimes previously, he was more liable to commit the crime for which he is presently being indicted and tried. State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989).

It is presumed a Defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and

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(4) the trial court gave a limiting instruction. Syl. pt. 3. State v. LaRock, 470 S.E.2d 613 (1996).

The Appellant brings to this Court's attention that the West Virginia Supreme Court of Appeals uses a three (3) step analysis when reviewing assignments of error concerning the admission of evidence under Rule 404(b). First, the Court reviews for clear error that the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Secondly, the Court reviews de novo whether the trial court correctly found the evidence was admissible for a legitimate purpose. The Court then reviews for an abuse of discretion the trial court's conclusion that the other acts evidence is more probative than prejudicial under Rule 403. State v. Taylor, 215 W.Va. 74, 593 S.E. 2d 645 (2004).

During the trial of the Appellant, when the trial court became confronted with evidence of other crimes, the trial court should have immediately conducted an in-camera hearing under Rule 104(a) of the West Virginia Rules of Evidence. During this hearing, the trial court should have decided whether this evidence of whether the Appellant had sexually abused his 13-year-old sister in 1987 was relevant. If the trial court had determined that this evidence was relevant under Rule 402, then the Court would have to determine whether the evidence was more

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probative than prejudicial under Rule 403 of the West Virginia Rules of Evidence. If the trial court then determined that the evidence was more probative than prejudicial, the trial court could allow the evidence with a limited instruction to the jury. State v. Taylor, supra.

Under State v. Taylor, supra, and State v. McGinnis, supra, the trial court failed to perform the following:

1. The trial court failed to conduct an in-camera hearing under Rule 104(a); and

2. The trial court failed to establish by a preponderance of the evidence that the allegation that Appellant had sexually abused his 13-year-old sister in 1987 was accurate; and

3. The trial court failed to determine whether the allegation that Appellant had sexually abused his 13-year-old sister in 1987 was relevant under Rule 402; and

4. The trial court failed to conduct the balancing test under Rule 403 of whether the evidence, if relevant, was more probative than prejudicial; and

5. The trial court failed to give a limiting instruction to the jury at the time the evidence was admitted and failed to give a limited instruction at the conclusion of all of the evidence.

The Appellant respectfully reminds this Court of the holding in State v. McDaniel, 211 W.Va. 9, 560 S.E. 2d 484 (2001). In McDaniel the Defendant was tried for sexual assault in the second degree and burglary. The State presented evidence that the Defendant had allegedly broken into the victim's apartment and penetrated her vagina with his

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finger. The State then presented evidence from a witness who testified that the Defendant in 1987 had broken into her apartment and beaten and raped her. The trial court did not permit the Defendant to question this witness as to a recent criminal conviction. The Defendant was convicted of first degree sexual abuse and burglary and was sentenced to consecutive prison sentences.

The Court reversed the conviction due to improper admission of Rule 404(b) evidence. Specifically, the Court stated that while 404(b) evidence can be used to show modus operandi, the incidents presented at trial were "not sufficiently similar nor sufficiently unique" to invoke the modus operandi principle. The Court noted that when there is a great potential for unfair prejudice if 404(b) evidence is admitted, the legitimate purpose for such evidence must be well shown.

The McDaniel case is similar to the instant case. In McDaniel the trial court attempted to use evidence of a sex crime which occurred in 1987 which was thirteen (13) years before the Defendant's trial. In the case at hand, the Appellant was confronted with alleged evidence that he sexually abused his 13-year-old sister in 1987 which was eighteen (18) years before this trial which occurred in 2005. By permitting evidence to come before the jury alleging that the Appellant had previously sexually abused his 13-year-old sister in 1987 was enormously

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prejudicial. Any jury, even if they had been instructed, would be sorely tempted to convict the Appellant simply because of such a prior act regardless of the level of proof of the offense for which the Appellant was actually charged. Furthermore, the Appellant was never charged and was never convicted of the 1987 allegation involving his sister.

Your Appellant was denied a fair trial under Amendment V to the United States Constitution and Article III, Section 10 of the West Virginia Constitution when the jury was allowed to hear evidence that the Appellant allegedly abused his thirteen (13) year old sister in 1987. This Counsel can think of no other evidence that would inflame a jury and cause a jury to convict because of other alleged bad acts. Appellant submits: What jury could still objectively hear the facts of this case and make a fair and impartial decision once the jury realized the Appellant was alleged to have sexually abused his 13-year-old sister?

THE COURT ERRED WHEN IT VIOLATED RULE 801(d)(1)(B) OF THE WEST VIRGINIA RULES OF EVIDENCE BY PERMITTING AN OUT-OF-COURT STATEMENT OF A CO-CONSPIRATOR TO BE USED AGAINST THIS APPELLANT WHEN THE DECLARANT WAS AVAILABLE AND TESTIFIED AT THE TRIAL.

In the trial of this matter, the State was permitted to introduce an audiotape and play the same for the jury which audiotape was an out-of-court statement made by Zandell Bryant to police officers at or near the time of the arrest of the said Zandell Bryant. The statement of Zandell Bryant implicated your Appellant in the death of Wanda Lesher

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and at the time of the trial of your Appellant, Zandell Bryant had already been found guilty of Second Degree Murder and other charges in the death of Wanda Lesher.

It should be noted that the tape was played for the jury and before the testimony of Zandell Bryant. The tape was admitted as State's Exhibit 26 and was properly objected to by Appellant's Counsel. (Volume 2, Tr. pages 104, 105, 106 & 107). The Judge erroneously believed that this audiotape was a hearsay exception under Rule 804 of the West Virginia Rules of Evidence. (Volume 2, Tr. page 107).

Rule 804 of the Rules of Evidence more specifically 804(b)(3) provides as follows:

> Statement against interest. - A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. Furthermore, for a statement or a audiotape to be admissible under this rule, the trial Court must determine (a) The existence of each separate statement in the narrative; (b) whether each statement was against the penal interest of the declarant; (c) whether corroborating circumstances exist indicating the trustworthiness of the statement; and (d) whether the declarant is unavailable.

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The trial judge in this matter erroneously believed that the tape was a hearsay objection as it was an admission against penal interest. (Volume 2, Tr. pg. 107) However, this is simply not the case. The audiotape was a prior consistent out-of-court statement and was controlled by West Virginia Rules of Evidence 801(d)(1)(B). The State was simply offering this tape to bolster the testimony of Zandell Bryant. There was no evidence presented the tape was being offered as an exception to the hearsay rule where it could have been offered under 801(d)(1)(B) if there was an express or implied charge against the declarant of recent fabrication or improper influence or motive and the statement is offered to rebut the charge.

Under State v. Quinn, 200 W.Va. 432, 490 S.E. 2d 34 (1997) a prior consistent out-of-court statement (the audiotape of the statement of Zandell Bryant) who testifies and can be cross examined about the statement is inadmissible unless the statement is being admitted for the purpose to rebut the charge that the declarant made the out-of-court statement and it was a result of recent fabrication or improper influence or motive. None of this occurred in the trial of your Appellant. The State simply offered the audiotape as a means to bolster the testimony of Zandell Bryant and then later permitted Zandell

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Bryant to testify at trial. Therefore, the audiotape was hearsay and should have been excluded.

The irony in the case at hand is that the declarant, Zandell Bryant, was present and did testify at the trial of this matter. Consequently, Exhibit 26 was offered simply to bolster the testimony of Zandell Bryant and was obvious hearsay and was not admissible pursuant to Rule 802 of the West Virginia Rules of Evidence. Furthermore, by allowing the admission of Exhibit 26 (audiotape) and allowing the jury to hear the same, the Defendant was deprived of his right to confront the witness pursuant to the confrontation clause as is contained in the Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution.

The mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials, and the touchstone is whether there has been a satisfactory basis for evaluating the truth of the prior statement. An essential purpose of the Confrontation Clause is to ensure an opportunity for cross-examination. In exercising this right, an accused may cross-examine a witness to reveal possible biases, prejudices, motives or intent. It is true that learned Counsel was given an opportunity at trial to cross examine Zandell Bryant about the statements made in the audiotape.

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However, the impact of the audiotape being played before the jury long before Zandell Bryant was ever called as a witness and without the opportunity of Appellant's counsel to cross examine the content of the audiotape while the same was being played, denied the Appellant his right to cross examine Zandell Bryant regarding Mr. Bryant's possible biases, motives, prejudices, etc. The audiotape as reflected in Exhibit 26 was hearsay evidence which was offered for the truth of the matter asserted and did not fall into any exception to the hearsay rule.

REVERSIBLE ERROR WAS COMMITTED IN THIS CASE AS THE ASSISTANT PROSECUTING ATTORNEY MADE IMPROPER REMARKS DURING OPENING STATEMENTS.

Your Appellant contends that this conviction should be reversed because of improper remarks made by the Assistant Prosecuting Attorney to the jury as the improper remarks were clearly prejudicial and resulted in manifest injustice. More specifically, during the opening statement, the Assistant Prosecutor stated:

> "After this murder Alfred continued on his drinking spree and he told a lot of people. He told a lot of people different stories. He had a car wreck. A woman got killed. I think one time a car wreck and a man got killed, but it was on his conscience, it was bothering him and he had to get it off. Alfred took what we would say a plea bargain in this case. Alfred had a conscience. He didn't want to go to trial. He said, "I'll plead guilty to first degree murder and I'll testify against the people that helped." So far he's testified against three. He's testified against Aaron Nelson, the defendant's brother; Aaron Nelson was found guilty of first degree murder, no recommendation of mercy. He was found guilty of

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kidnapping, no recommendation of mercy. He was found guilty of sexual assault in the first degree. Alfred Dingess testified against Zandell Bryant." (Volume 2, Tr. Pages 28 & 29).

Counsel for Appellant at this point made a Motion for a mistrial which the Trial Court denied. (Volume 2, Tr. Page 29) However, the Trial Court apparently found merit in Appellant's Counsel's Motion for a Mistrial as a cautionary instruction was given to the jury concerning the Assistant Prosecutor's opening statement. (Volume 2, Tr. Page 31 - 32).

Appellant recognizes that a judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice. Syllabus point 5, State v. Ocheltree, 170 W.Va. 68, 289 S.E. 2d 742 (1982). Appellant further recognizes that four factors are taken into account in determining whether improper prosecutorial comments is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters. Syllabus point 6, State v. Sugg. 193, W.Va. 388, 456 S.E. 2d 469 (1995).

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1. Did the Assistant Prosecutor's remarks have a tendency to mislead the jury and prejudice the Appellant? Yes. It must be remembered that the first time the jury was allowed to hear from the Assistant Prosecuting Attorney regarding what the State believed the evidence would show, the Assistant Prosecutor made the improper comments which were quoted above. It would be impossible to know what impact these improper comments had on the jury.

2. Were the remarks isolated or extensive? The Appellant states that the remarks were isolated. However, it should be noted that once again in closing arguments, the Prosecuting Attorney attempts to sway the jury by discussing issues which appeal to the jury's passions and emotions rather than the facts. More specifically, the Prosecuting Attorney in closing arguments stated as follows: "Where is the brothers to testify? He didn't do anything, he didn't do nothing." (Transcript April 15, 2005, Tr. Page 245). It should be noted that Counsel for Appellant objected to this statement and the same was sustained by the Trial Court Judge.

3. What was the proof absent the remarks? Appellant submits that insufficient evidence existed to convict the Appellant of the crimes alleged. It should be noted that the only physical evidence introduced at trial was the 2x4 or 2x6 allegedly used to strike the victim.

4. Were the comments deliberately placed before the jury? Appellant is unable to answer this question other than to say that the improper comments were made.

Appellant is certain this Court is mindful of the fact that in a criminal trial of an individual charged with a felony, the twelve (12) people sitting on that jury should concentrate on the evidence presented in the case at hand and decide the case based upon that evidence. Improper comments, such as were made here, distract the jury and tend

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to lead the jury to deciding guilt or innocence based upon other factors than the evidence presented.

As discussed above, a prosecuting attorney occupies quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. Consequently, applying the Sugg factors to the case at hand, Appellant contends that the Assistant Prosecutor's remarks misled the jury on the issue of guilt or innocence as the statement was basically asking the jury to determine guilt or innocence based upon the criminal conduct of others.

It is Appellant's belief that jurors oftentimes want to believe the Attorney for the State rather than the Attorney for the Defendant because it is the Attorney for the State who represents the interest of justice. Consequently, an improper comment during the opening statement by the State's attorney can have an overwhelming effect on the jury's understanding of justice. It is for that reason that the Appellant contends that the conviction should be reversed and a new trial granted.

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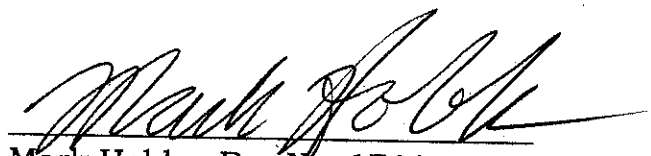
CONCLUSION

Based upon the above, the Appellant, David Nelson, hereby submits to this Court that sufficient grounds have been established to reverse the jury verdict rendered in this matter on April 15, 2005, and vacate or modify the Sentencing Order entered in the Circuit Court of Mingo County, West Virginia, on May 20, 2005; that the Appellant be granted a new trial; and to remand the matter to the Circuit Court for further proceedings that are consistent with the Court's decision.

David Nelson

By Counsel



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CERTIFICATE OF SERVICE

I, Mark Hobbs, Counsel for Appellant, do hereby certify that a true and accurate copy of the foregoing Appellant's Brief was sent by United States Mail, postage prepaid, to Dawn E. Warfield, Esquire, Attorney General's Office, 1900 Kanawha Boulevard, East, Room E-26, Charleston, West Virginia 25305-0220, on this the 16th day of January, 2007.

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